

TCEQ DOCKET NO. 2013-1406-MSW

APPLICATION BY	§	BEFORE THE
NORTH TEXAS MUNICIPAL WATER	§	
DISTRICT FOR MUNICIPAL SOLID	§	TEXAS COMMISSION ON
WASTE PERMIT NO. 53A	§	
	§	ENVIRONMENTAL QUALITY

APPLICANT'S RESPONSE TO REQUESTS FOR HEARING

Applicant North Texas Municipal Water District ("NTMWD") files this its Response to Requests for Hearing pursuant to 30 TAC §55.209(d) and other applicable rules of the Texas Commission on Environmental Quality ("TCEQ" or the "Commission"), and respectfully shows the following:

I. INTRODUCTION

NTMWD has applied to the TCEQ to amend its Solid Waste Permit No. 53 for the Lookout Drive Transfer Station ("Lookout") in Richardson, Texas (the "Permit") to authorize the construction of a new transfer station building to replace the existing building.

On October 26, 2011, NTMWD submitted its application to the TCEQ. The Executive Director declared the application administratively complete on November 15, 2011. The Notice of Receipt of Application and Intent to Obtain a Permit was published on December 3, 2011 and the alternative language notice was published on December 4, 2011. Following notice, a public meeting was held on October 9, 2012 at the Douglas Otto Middle School Cafetorium. The initial comment period for this Application was completed at the close of that meeting.

The Executive Director completed the technical review of the Application on December 10, 2012 and prepared a draft permit. The Notice of Application and Preliminary Decision was published on January 12, 2013 and the alternative language notice was published on January 12, 2013.

The comment period ended on February 11, 2013 and the Executive Director filed and served his Response to Comments on June 13, 2013. The deadline to file a request for hearing was July 18, 2013.

II. LEGAL BASIS AND ORGANIZATION OF RESPONSE

Section 55.211 of the TCEQ's rules provides that a request for a contested case hearing shall be granted if the request is made by an "affected person" and it:

- (1) raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter... and that are relevant and material to the commission's decision on the application;
- (2) is timely filed with the chief clerk;
- (3) is pursuant to a right to hearing authorized by law; and
- (4) complies with the requirements of §55.201 regarding timing and contents of hearing requests.

30 TAC § 55.211(c)(2).

Section 55.201, in turn, requires that the hearing request substantially comply with the following:

- (1) give the name, address, [and] daytime telephone number of the person; who files the request...
- (2) identify the person's personal justiciable interest...;
- (3) request a contested case hearing;
- (4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request...; and
- (5) provide any other information specified in the public notice of the application.

Id. at § 55.201(d).

Section 55.209 further states that responses to hearing requests must specifically address:

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or of law;
- (4) whether the issues were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing . . . ;
- (6) whether the issues are relevant and material to the decision on the application; and

- (7) a maximum expected duration for the contested case hearing.

Id. at 55.209(e).

This response is organized to address each of these requirements. Section III discusses whether each hearing requestor is an “affected person.” Section IV analyzes the particular issues raised by these hearing requests. Section V discusses the issues to which NTMWD objects as not being eligible for referral. Section VI discusses the maximum expected duration of the hearing. Section VII requests an opportunity for mediation. Finally, the conclusion and prayer (Section VIII) contains a list of all issues that are appropriate for referral in terminology appropriate for referral, considering the relevant TCEQ regulatory language.

III. DETERMINATION OF AFFECTED PERSONS (§55.209(e)(1))

The Commission's rules provide that:

[A]n affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest.

Id. at §55.203(a).

In determining whether an individual is an affected person, the rules require consideration of:

... all factors ...including, but not limited to, the following:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person; [and]

- (5) likely impact of the regulated activity on use of the impacted natural resource by the person ...”.

Id. at §55.203(c).

NTMWD has identified 30 timely-filed hearing requests that have been submitted by the following persons (collectively, the “Requestors”):¹

- (1) Jane Mertz, 3209 Foxcreek Dr., Richardson, TX 75082;
- (2) Gerald Long, 1512 Braeburn Dr., Richardson, TX 75082;
- (3) Megan & Mike Davis, 3105 Foxcreek Dr., Richardson, TX 75082;
- (4) Sherrill S. Bodie, 2315 Windsor Dr., Richardson, TX 75082;
- (5) Gay Riley, 1510 Braeburn Dr., Richardson, TX 75082;
- (6) Kurt Middelkoop, 2709 Foxcreek Dr., Richardson, TX 75082;
- (7) Angie Baldwin, 1604 Pickwick Lane, Richardson, TX 75082;
- (8) Jocelyn & Todd Bartz, 1514 Margate Lane, Richardson, TX 75082;
- (9) Joseph Wilson, 3007 Foxcreek Dr., Richardson, TX 75082;
- (10) John Harris, 1417 Ridgemoor Lane, Richardson, TX 75082;
- (11) Sue Gordon, 3302 Owens Blvd., Richardson, TX 75082;
- (12) Chris Klein, 3102 Owens Blvd., Richardson, TX 75082;
- (13) Connie S. Gibson, 1504 Braeburn Dr., Richardson, TX 75082;
- (14) Robert Alan Davis, 1511 Woodoak Dr., Richardson, TX 75082;
- (15) Betty Formby Groover, 1704 Woodoak Dr., Richardson, TX 75082;
- (16) Phillip Rochelle, 2341 Woodglen Dr., Richardson, TX 75082;
- (17) Sam & Sharon Ricks, 1410 Jennifer St., Richardson, TX 75082;
- (18) John Moisuk, 1716 Woodoak Dr., Richardson, TX 75082;
- (19) Martin Parker, 1409 Woodoak Dr., Richardson, TX 75082;
- (20) Darren Mann, 2305 Owens Blvd., Richardson, TX 75082;
- (21) Curt Vanlandingham, 1417 Woodoak Dr., Richardson, TX 75082;
- (22) Carla Ann Scalf, 1712 Woodcreek Dr., Richardson, TX 75082;
- (23) Mary Keene, 1712 Woodoak Dr., Richardson, TX 75082;
- (24) Mike Frizzell, 1531 Springtree Circle, Richardson, TX 75082;
- (25) John Demattia, 2214 Shannon Lane, Richardson, TX 75082;
- (26) Judy Baca, 1707 Woodcreek Dr., Richardson, TX 75082;
- (27) Barbara Fullerton, 1607 Woodoak Dr., Richardson, TX 75082;
- (28) Laurie Moore, 1707 Yorkshire Dr., Richardson, TX 75082;
- (29) Amy Marcy, 1512 Yorkshire Dr., Richardson, TX 75082; and
- (30) Katherine Cargile, 1605 Woodoak Dr., Richardson, TX 75082.

Each of these Requestors has supplied an address to TCEQ as part of their comments and/or hearing requests. Based upon those representations, each appears to reside within a one-

¹ In addition to the hearing requests identified herein, correspondence was received from Mr. Robert Vargas dated December 29, 2011, which the Chief Clerk’s office denoted with an “H,” indicating that it considered the correspondence to be a hearing request. In the correspondence, Mr. Vargas states that the “purpose of this correspondence is to request that the hearing regarding the above referenced permit be held in the City of Richardson,” but does not request such a hearing be held. NTMWD does not consider this to be a hearing request, since it failed to request a hearing as required by § 55.201(d)(3), and has not treated it as such in this response.

mile radius of Lookout. Therefore, subject to later discovery, NTMWD has no objection to identifying this list as “affected persons” if their hearing requests are compliant with the remaining TCEQ regulations cited above.

In examining the requests of the Requestors, it quickly becomes apparent that the first 13 Requestors filed nearly identical requests that included several issues that are disputed fact issues relevant and material to the TCEQ’s decision on this application.² Because these hearing requests appear to otherwise meet the TCEQ regulations cited above, NTMWD does not object to the following persons being designated as parties to this contested case hearing:

- (1) Jane Mertz;
- (2) Gerald Long;
- (3) Megan & Mike Davis;
- (4) Sherrill S. Bodie;
- (5) Gay Riley;
- (6) Kurt Middelkoop;
- (7) Angie Baldwin;
- (8) Jocelyn & Todd Bartz;
- (9) Joseph Wilson;
- (10) John Harris;
- (11) Sue Gordon;
- (12) Chris Klein; and
- (13) Connie S. Gibson.

The second category of Requestors contains those who filed requests that were individually drafted and not copied and submitted with the language which dominates the first thirteen, which raised at least one relevant disputed fact issue, and which otherwise appear to meet the TCEQ regulations cited above. Therefore, subject to later discover, NTMWD has no objection to their being designated an affected person worthy of being named a party and having their requests granted:

- (1) John Moisuk;
- (2) Darren Mann;
- (3) Curt Vanlandingham;

² Each issue is discussed in the Section IV below).

- (4) Mary Keene;
- (5) Mike Frizzell;
- (6) John Demattia; and
- (7) Laurie Moore.

The third category of Requestors is comprised of 2 individuals who raised only one issue, a private Memorandum of Understanding between the City of Richardson, NTMWD and several homeowner groups. As discussed in Section IV below, this issue is not tied to any TCEQ regulatory requirement and cannot be the basis for denial of the application. Therefore the following hearing requests should be denied and the Requestors not designated as affected persons whose requests merit granting:

- (1) Amy Marcy; and
- (2) Katherine Cargile.

Finally, the following persons' hearing requests are deficient in that they do not raise any issues of disputed fact relevant and material to the Commission's decision on the application, and therefore, pursuant to 30 TAC § 55.211(c)(2)(A), their requests have not complied with TCEQ requirements and cannot be granted regardless of whether they live within proximity to Lookout:

- (1) Robert Alan Davis;
- (2) Phillip Rochelle;
- (3) Sam and Sharon Ricks;
- (4) Martin Parker;
- (5) Carla Ann Scalf; and
- (6) Judy Baca.

Two hearing requestors withdrew their requests for hearing, apparently because they were, instead, interested in having a public meeting, and should therefore not have their hearing requests granted:

- (1) Betty Formby; and

(2) Barbara Fullerton.

Finally, NTMWD notes that numerous hearing requests reference the Requestors' membership in, or the Requestor identified him or herself as a spokesperson for, a group referred to as "a Collective of Residents directly Affected by the Application Permit 53A." This reference is notably not accompanied by a request that this group be named as a party in the contested case hearing on this application. Therefore NTMWD has not included any analysis of whether that group should be designated as a party to this matter based upon the requirements in 30 TAC § 55.205.

IV. ISSUES FOR REFERRAL (§55.209(e)(2-6))

Once the "affected person" analysis has occurred and eligible parties have been identified, the Commission must determine which issues that have been raised by an affected person in a valid hearing request should be referred to the State Office of Administrative Hearings ("SOAH") for consideration in the contested case hearing. *See* TEX. WATER CODE ANN. §5.556(e). Section 5.556 also requires the Commission to limit both the number and scope of issues that are referred to SOAH for hearing. *Id.*

NTMWD believes that the most straightforward approach to addressing the issues that have been raised is to refer to the Executive Directors' Response to Comments ("RTC") and its numbering of the issues raised during the comment period. Since all referred issues must have been raised in a comment, not withdrawn, made by an affected person, and be relevant and material to the application, the RTC identifies the spectrum of issues that may be eligible for referral. Additionally, thirteen of the hearing requests specifically identify their issues by calling out their corresponding comment number in the RTC.

Applying this to the issues herein, NTMWD has no objection to the following issues being referred to the State Office of Administrative Hearings ("SOAH") on the NTMWD Lookout application:

- (A) Noise Levels (Comment 3);
- (B) Adverse Impact on the Environment and Human Health (Comment 4);
- (C) Land Use Compatibility (Comment 5);
- (D) Nuisance Odors (Comment 6);
- (E) Traffic Impacts (Comment 7);
- (F) Wind Blown Trash (Comment 10); and
- (G) Surface Water or Stormwater Impacts (Comment 15).

NTMWD will propose appropriate wording for each issues in its prayer. Each of these issues was raised during the comment period, included in a valid hearing request by an affected person and is relevant by virtue of being tied to a regulatory consideration germane to the TCEQ's decision on this type of application.

V. ISSUES NOT ELIGIBLE FOR REFERRAL

Certain of the remaining comments did not carry over to any hearing request made in this matter, therefore they may not be considered for referral as issues in the contested case hearing in this matter. The following comments fall into this category:

- (A) Increase in volume of waste through Lookout (Comment 2);
- (B) Request for a Public Meeting (Comment 8);
- (C) Vector control (Comment 9);
- (D) Landscaping/Screening (Comment 11);
- (E) Receipt of Hazardous Waste (Comment 14);
- (F) Air Emissions other than Odor (Comment 16);
- (G) Air Emissions from Trucks at the site (Comment 17);
- (H) Floodplain (Comment 19);
- (I) Zoning other than as a component of Land Use Compatibility (Comment 20);
- (J) Illegal Dumping (Comment 21);
- (K) Strangers Loitering at Lookout (Comment 25);
- (L) Notice Issue (Comment 26);
- (M) Failure to classify Spring Creek as Water of the U.S. (Comment 29);
- (N) Failure to conduct a Noise and Air Emission Study (Comment 30); and
- (O) Support for the Facility (Comment 31).

This leaves remaining 9 comments/issues that were both raised in a comment during the comment period and were also included in one or more of the hearing requests timely filed by affected persons:

- (A) MOU (Comment 1);
- (B) Alternate Site (Comment 12);
- (C) Property Values (Comment 13);
- (D) Environmental Impact Statement/Study (Comment 18);
- (E) Lookout to be built on Closed Landfill (Comment 22);
- (F) Truck Leaks (Comment 23);
- (G) Lead Contamination from Gun Range (Comment 24);
- (H) Contamination of Site by City of Richardson Fire Training Area (Comment 27);
and
- (I) Contamination of Spring Creek by City of Richardson Fire Training Area and/or Closed Landfill (Comment 28).

Of the nine requested issues listed above, four of them (E, G, H, and I) relate to the protestants' belief that some portion of the site has historic contamination related to its alleged prior use as a municipal landfill, a gun range for the Richardson Police Department, and/or a fire training area for the City's Fire Department. NTMWD admits that parts of the existing and/or proposed amended site belonged to the City of Richardson and were used for its Police and Fire Department training. NTMWD also acknowledges that it, along with the City of Richardson, received an enforcement notice regarding an investigation of possible contamination of alluvial flow into Spring Creek by fire suppressant chemicals that may have been used when the City of Richardson owned and operated the property as a fire training center. However, as stated by the Executive Director in its response to comment no. 27, TCEQ's regulations "do not provide that an application for a transfer station should be denied or delayed based on" these issues. Therefore these historic use potential contamination issues are not eligible for referral to the SOAH contested case hearing as relevant and material disputed fact issues on this application. NTMWD acknowledges that, if during construction of the facility, a landfill is discovered,

NTMWD will be required to comply with TCEQ rules regarding construction over a closed landfill, as found in 30 TAC Chapter 330, Subchapter T.

The remaining five issues (A, B, C, D, and F) should not be referred to the contested case hearing due to their not being relevant and material to the Lookout application, even though they were raised in both comments and hearing requests. With respect to issue A (MOU), as stated by the Executive Director in the RTC, the MOU is a private document that is not a part of the application and is not enforceable by the TCEQ. Any dispute the protestants may have about this document must be brought up in some other forum. Issues B and C (alternate site and property values) are commonly requested issues that are routinely denied by the TCEQ as not being matters within the TCEQ's jurisdiction and therefore not relevant or material to its decision. Similarly, with respect to issues D and E, the request that an Environmental Impact Study be conducted and that leaks from collection vehicles be prevented, are not TCEQ requirements on applications such as this and therefore are not relevant and should be rejected.

VI. DURATION OF HEARING (§55.209(e)(7))

Responses to hearing requests must address the maximum expected duration of the hearing from the first day of the preliminary hearing to the issuance of the proposal for decision. NTMWD suggests that, given the number of parties and issues, the applicant believes that 10 months is an appropriate duration.

VII. MEDIATION

NTMWD respectfully requests that three (3) weeks be allowed for mediation between the parties, to be conducted by TCEQ mediators, prior to referral to SOAH.

VIII. PRAYER

Subject to later discovery, NTMWD does not object to the following persons being designated as parties to this contested case hearing:

- (1) Jane Mertz;
- (2) Gerald Long;
- (3) Megan & Mike Davis;
- (4) Sherrill S. Bodie;
- (5) Gay Riley;
- (6) Kurt Middelkoop;
- (7) Angie Baldwin;
- (8) Jocelyn & Todd Bartz;
- (9) Joseph Wilson;
- (10) John Harris;
- (11) Sue Gordon;
- (12) Chris Klein;
- (13) Connie S. Gibson;
- (14) JohnMoisuk;
- (15) Darren Mann;
- (16) Curt Vanlandingham;
- (17) Mary Keene;
- (18) Mike Frizzell;
- (19) John Demattia; and
- (20) Laurie Moore;

NTMWD concurs that the following issues are appropriate for referral to SOAH:

- (A) Whether the proposed permit provides for screening or other measures to minimize noise pollution as required by 30 TAC § 330.239;
- (B) Whether the proposed permit will not allow collection, storage, processing, or disposal of MSW in a manner that causes the endangerment of the human health or the environment as required by 30 TAC § 330.15(a)(3) and § 330.61(h);
- (C) Whether the application contains the information required by 30 TAC § 330.61(h) to allow the Commission to assess the land use compatibility, and whether the

Commission properly considered land use compatibility in accordance with Tex. Health & Safety Code § 361.089 and § 361.069;

- (D) Whether the proposed permit contains odor control measures as required by 30 TAC § 330.63(b)(2)(C), § 330.209(b), § 330.241(a), § 330.241(b), and § 330.243(b), § 330.245;
- (E) Whether the application contains the information required by 30 TAC § 330.61(i) and whether the Commission properly considered traffic impacts;
- (F) Whether the proposed permit requires the collection of windblown litter as required by § 330.233;
- (G) Whether the proposed permit provides for handling of contaminated water in accordance with 30 TAC § 330.207, § 330.227, § 330.243, and § 330.55(b); and
- (H) Whether the proposed permit provides for managing surface water drainage in accordance with 30 TAC § 330.303.

NTMWD prays that the requests of all other Requestors be denied, and that all other issues not be referred. NTMWD further prays or any and all other relief to which it may show itself entitled.

Respectfully submitted,

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Certificate of Service

I certify that a true and correct copy of Applicant North Texas Municipal Water District's Response to Requests for Hearing was served on the following entities or individuals by U.S. Regular Mail, Certified Mail (return receipt requested), electronic mail, hand delivery and/or facsimile at the addresses listed below on this 16th day of September, 2013.

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